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Supreme Court of the United States

OCTOBER TERM—1938.

Nos. ~~994-995~~ 73-74

POSTAL STEAMSHIP CORPORATION,
Petitioner,

against

STEAMSHIP EL ISLEO, etc.;
SOUTHERN PACIFIC COMPANY, Claimant,
Respondent.

POSTAL STEAMSHIP CORPORATION,
Petitioner,

against

SOUTHERN PACIFIC COMPANY,
Respondent.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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POSTAL STEAMSHIP CORPORATION, Petitioner, AGAINST SOUTHERN PACIFIC COMPANY, Respondent.	No.

PETITION.

MAY IT PLEASE THE COURT:

Your petitioner prays for writs of certiorari to review a decision of the Circuit Court of Appeals for the Second Circuit, in admiralty, affirming two decrees of the District Court for the Southern District of New York, one a final decree dismissing the petitioner's libel against the respondent's steamship El Isleo and the other an interlocutory decree in favor of the respondent upon its cross-libel against the petitioner's steamship Eastern Glade.

The opinion of the Circuit Court of Appeals, dated January 9, 1939, is reported in 101 F. (2d) 4 [R. 383], and that of the District Court in 20 F. Supp. 373. The orders for mandate were entered in the office of the Clerk of the Circuit Court of Appeals on March 8, 1939 [R. 386-8]. Jurisdiction is based on §240(a) of the Judicial Code, as amended; 28 U. S. Code §347.

Summary.

There was a collision between the petitioner's steamship Eastern Glade and the respondent's steamship El Isleo, for which the petitioner's vessel has been held solely at fault.

An essential basis of the Circuit Court of Appeals' decision is a line of its own former decisions with which the present members of that court do not agree, and which they have critically examined and demonstrated to be wrong, but to the authority of which they have here deferred, intimating that they purpose so deferring "until the Supreme Court speaks" [R. 385].

The matter involves the construction of a statute of the United States (33 U. S. Code §§206, 212; 30 Stat. 101) in relation to Rules II and VII of the Supervising Inspectors.*

Where, in the inland waters of the United States, two steamships are on crossing courses, and the one required to give way proposes an unacceptable departure from the statutory starboard-hand rule, what should the other vessel do?

Should she maintain her course and speed until it becomes evident to her master that the first vessel alone cannot or will not avoid collision? (So the court held here, correctly if the Supervising Inspectors' Rules are a nullity in such cases.) Or should she conform to the objective standard set up by the Supervising Inspectors, defining the situation as one of immediate danger, and obey their injunction to stop and back if necessary until an understanding has been reached? (So the Circuit Court of Appeals would hold now "if the question were *res integra*": page 6, *infra*.)

That point, clearly recognized and decided below adversely to the petitioner (R. 385), is submitted to warrant and in justice require the decision of this honorable court.

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* Pertinent provisions of the statute and the rules are printed in the appendix, and copies of the government pamphlet containing the full text of the statutory regulations and the Supervising Inspectors' Rules are submitted herewith.

The Question Presented.

Are Rules II and VII of the Supervising Inspectors (Pilot Rules for Certain Inland Waters of the Atlantic and Pacific Coasts and of the Coast of the Gulf of Mexico), promulgated pursuant to the authority of Congress (33 U. S. Code § 157), actually in conflict with Article 21 of the Inland Rules (33 U. S. Code § 206 and § 212), as the courts of the second circuit formerly held; or are those Rules consistent with the statute, as the Supervising Inspectors have persistently maintained and as the Circuit Court of Appeals has said that it would now hold except for its own contrary decisions?

Statement.

Proceeding down Curtis Bay Channel, Baltimore Harbor, in a clear evening (December 19, 1935), the petitioner's vessel sighted, four points on her starboard bow, the respondent's vessel El Isleo. The latter, about a mile away, was proceeding up Fort McHenry Channel, which the first Channel meets approximately at right angles. The petitioner's vessel, intending to turn left at the junction and proceed up Fort McHenry Channel, stopped her engines and shortly thereafter blew two blasts. El Isleo answered with an alarm signal, followed by a cross-signal of one blast, indicating that she would hold her course and speed. The petitioner's vessel again sounded signals (her master says three blasts, El Isleo says four and one), and reversed her engines; but El Isleo kept on at full speed until she reached the buoy just opposite Curtis Bay Channel, when, believing collision imminent, she put her rudder hard right and swung out of Fort McHenry Channel to her starboard. The petitioner's vessel went across Fort McHenry Channel, and brought her stem into contact with El Isleo's port side about amidships.

It was conceded on the argument of the appeal that the Eastern Glade was at fault (R. 385), but it was contended that El Isleo likewise was at fault (R. 373).

All of the facts involved in that contention have been resolved by the Circuit Court of Appeals in such a way as to bring into focus only the question that is here presented.

Having found that the two vessels, although in separate channels, were technically on crossing courses, the Circuit Court of Appeals held that El Isleo had the right to sound a one-blast signal in answer to the Eastern Glade's signal of two blasts, and had the right to maintain her course and speed until it became evident to her master that the Eastern Glade alone could not or would not avoid collision.

Such is the law, beyond dispute, provided Rules II* and VII* of the Supervising Inspectors are *invalid*. If, on the other hand, those Rules are *valid*, as the Circuit Court of Appeals has said that it should now decide if the subject were *res integra*, El Isleo was manifestly at fault with the Eastern Glade.

Rule II* of the Supervising Inspectors forbids the sounding of cross-signals; and El Isleo violated that Rule in answering two blasts with one. In addition, Rule VII* required her, in rejecting the Eastern Glade's two-blast proposal, to sound alarm signals and stop, and to reverse if necessary, instead of continuing at full speed until collision was inevitable. There is no doubt that such is the meaning and intended effect of those two Rules, which were discussed by the Circuit Court of Appeals in the case of *The Fulton*, 54 F. (2d) 467, quoted below.

There is no doubt either that the Circuit Court of Appeals' decision here as to the sole fault of the Eastern Glade was premised on the invalidity of those two Rules. It is manifest that a different result would obtain if those Rules were to be given effect.

The point on which the petitioner seeks review was disposed of by the Circuit Court of Appeals (Judge Swan

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* Pages 11 and 12, *infra*.

writing with the concurrence of Judges Learned Hand and Chase) as follows:

> "To the two blast signal of the Eastern Glade Captain Korn responded with an alarm followed by one blast to indicate his refusal to yield his right of way. In *The Fulton*, 54 F. (2d) 467 we discussed the rule established in this circuit that in a crossing situation the privileged vessel may 'cross' the signal of the burdened vessel and hold her course and speed until it becomes evident that the burdened vessel either cannot or will not keep out of the way. *Although the rule was criticized, we thought it too firmly established to be departed from until the Supreme Court speaks. We still adhere to that view.*" [R. 384-5; our italics.]

Judge Learned Hand, who wrote the opinion in *The Fulton* case, there said:

> "The Inspectors' Rules have always forbidden cross signals in passing situations, and in all others too since 1909. *They have coupled the injunction with another which required the answering vessel, if the first signal was inappropriate, to sound an alarm and check her speed, now apparently confined to crossing situations* (Rule VII). In a number of decisions involving crossing situations we have exonerated a vessel which pressed her statutory privilege by crossing the signal and holding her course and speed. *The John King* (C.C.A.) 49 F. 469; *The Cygnus* (C.C.A.) 142 F. 85; *The Transfer No. 15* (C.C.A.) 145 F. 503; *The John H. Starin* (C.C.A.) 162 F. 146; *The Montauk* (C.C.A.) 180 F. 697; *The Ashley* (C.C.A.) 221 F. 423.
>
> "Our reasoning has been, that, as the statute (Inland Rules) article 21 (33 USCA §206), puts a duty upon the privileged ship to keep her course and speed, no rule can be valid which affects to relieve her of it, and that she may announce her determination to insist by crossing the first signal. The doctrine has been too long and too repeatedly established to allow any question now, *but it is plain that the inspectors have never assented to it.* We have at times said that the rule promoted collisions,

which were to be avoided only by rigid adherence to the statutory rules. The supposed certainty is, however, somewhat illusory, for concededly there comes a time when the privileged vessel must yield; there is never a 'right of way into collision.' At best the point where she must do so, is one of degree, and, *were the question res integra, we should hold the rule valid.* The inspectors apparently believe that in the greater number of cases it will conduce to collision to allow a pilot to keep on in the face of a proposal by the approaching vessel that she put herself across his bows. True, the proposer often will not act without consent; but it is certainly possible that prudence forbids speculation as to whether he has still time or disposition to keep out of the way. Again and again cases arise in which the proposal is repeated, the vessels coming nearer all the time; sometimes it is repeated even after it has been crossed by a refusal. *No substantial interest is at stake except to escape collision which will certainly be avoided if both stop.* We recognize that the requirement puts a premium upon wilfulness, for the burdened vessel need only announce her purpose and keep on; and if the other prove docile, she has lost her right of way and must bear the insolence. This may perhaps prove too much for ordinary human nature, but 'safety is better than pride'; [*The Quogue*, 47 F. (2d) 873 (C.C.A. 2)], and stopping is more likely to avoid disaster than going on in the teeth of what is at least a proposal, and may be a declaration. *At any rate the situation appears to us proper for the exercise of the inspectors' function in providing for cases not covered explicitly. They are certainly in better position than we to determine which course is safer in the long run.*

"The court as now constituted cannot see any conflict with the statute, unless that be read without regard to its purpose. Articles nineteen and twenty-one (33 USCA §§204, 206) do not require any signals at all; if one is given proposing a dangerous course, it appears to us too verbal and rigid an interpretation to say that the privileged vessel is inevitably still bound; at least officials, vested with general authority, are not helpless to meet the situation by a rule. All the steaming rules are themselves

subject to Article twenty-seven (33 USCA §212) authorizing a departure 'to avoid immediate danger.' Can it be that though vessels themselves may so depart, the inspectors may not say that a situation likely to be dangerous shall be treated as such? However, unless the Supreme Court chooses finally to settle the whole matter otherwise, in crossing situations we have no option and shall continue to disregard the rule, whatever our personal judgment." (*The Fulton*, 54 F. (2d) 467, at 468; our italics.)

Because *The Fulton* case was found to involve a head-and-head situation, as to which the court did not feel precluded by its former decisions from recognizing the validity of Rule II, the court held a vessel at fault for sounding a cross-signal in violation of that Rule. Both vessels were held to blame, and there was no substantial reason for either party to seek a review in that case.

This case is the first since the opinion in *The Fulton* case was delivered to involve the point that was there so clearly discussed and is here so squarely presented.

It is probably unnecessary to mention that this point cannot possibly arise, and no similar uncertainty can exist, under the statutory International Rules, governing navigation on the high seas, as the one-blast and the two-blast signals there provided for may be given only to indicate a change of course on the part of the signalling vessel (33 U. S. Code §113; 26 Stat. 328, Art. 28). Under the statutory Inland Rules, here involved, those signals are prescribed by the statute itself only for head-and-head situations and for overtaking situations, in which both vessels must sound the appropriate signals for passing each other (49 Stat. 669, Art. 18; 33 U. S. Code §203). No statutory provision was made for any signals between vessels on crossing courses. That whole subject, of primary importance in navigation on the inland waters, is covered by Rule VII, in connection with Rules II and III, of the Supervising Inspectors.

Reasons Relied on for Allowance of Writ.

1. It was the intention of Congress, as this court has mentioned, that the Supervising Inspectors' Rules "*have the force of statutory enactment* • • • Obviously they must be rigorously enforced in order to attain the objects for which they were framed • • • " (*Belden* v. *Chase*, 150 U. S. 674, 698).

2. A serious conflict between the Supervising Inspectors' Rules and the decisions of the Circuit Court of Appeals for the Second Circuit as to the construction of a Federal statute for the prevention of collisions, is at best a disturbing condition. When all of the reasons for it have vanished from the mind of the court that created the conflict, its perpetuation through inertia is not creditable to the administration of the maritime law of the United States.

3. The licensed officers of steam vessels are subject to the disciplinary action of the Supervising Inspectors for a violation of their Rules (33 U. S. Code, § 158; 46 U. S. Code § 239), and so long as the present conflict exists an officer must choose in every case of this kind whether to obey the Inspectors' Rules, at the risk of losing his own command and rendering his employer liable in damages, or to disregard those Rules, as the court below holds he should, at the risk of losing his license. Uncertainty among shipmasters as to the laws by which they should be governed is hardly conducive to the safety of navigation.

4. The decision below is diametrically opposed to the applicable statutes. In providing that the so-called privileged vessel should maintain her course and speed (33 U. S. Code § 206), Congress directed also that she must depart therefrom to avoid an "immediate danger" of "navigation and collision" (*id.* § 212). At the same time Congress empowered the Supervising Inspectors to establish, with the approval of the Secretary of Com-

merce, such Rules as "they may from time to time deem necessary for safety" (*id.* § 157). Among the Rules so established is one that undertakes to define a specific occasion of "immediate danger", an occasion which the experienced court below now appreciates is in truth of "immediate danger", namely a burdened vessel's unacceptable proposal of an imminent departure from the law. In admitting that the Inspectors' definition is right, and that the court was itself wrong in formerly thinking otherwise, the distinguished judges below are left without the justification that their predecessors enjoyed in disregarding what is in fact the statutory law.

> 5. "It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past." Holmes, *J.*, 10 Harv. L. R., l. c. 469.

To this a private litigant might add that in his case a wrong rule on vanished grounds has prevailed against the considered views of the experienced judges who heard his case, and against the will of those to whom Congress entrusted the making of a proper rule that was to have "the force of statutory enactment."

Conclusion.

It is respectfully submitted that this controversy, immediately presenting an important question of the maritime law that has not been decided by this court; directly involving the construction of a Federal statute for the prevention of collisions, and reflecting a serious conflict between a Circuit Court of Appeals and an administrative agency created by Congress, is of such general concern as to merit review by this honorable court.

JOHN C. CRAWLEY,
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for the Petitioner.

New York, May , 1939.

Appendix.

Statutes.

33 U. S. Code §157. "*Special rules by inspectors, etc., of steam vessels authorized.* The supervising inspectors of steam vessels and the Director of the Bureau of Marine Inspection and Navigation shall establish such rules to be observed by steam vessels in passing each other and as to the lights to be carried by ferryboats and by barges and canal boats when in tow of steam vessels, and as to the lights and day signals to be carried by vessels, dredges of all types, and vessels working on wrecks or other obstruction to navigation or moored for submarine operations, or made fast to a sunken object which may drift with the tide or be towed, not inconsistent with the provisions of this Act [U. S. Code §§154 to 231, inclusive], as they from time to time may deem necessary for safety, which rules when approved by the Secretary of Commerce are declared special rules duly made by local authority, as provided for in article 30, chapter 802, laws 1890 [33 U. S. Code, section 131]. Two printed copies of such rules shall be furnished to such ferryboats, barges, dredges, canal boats, vessels working on wrecks, and steam vessels, which rules shall be kept posted up in conspicuous places in such vessels, barges, dredges, and boats." (Act of June 7, 1897, c. 4, §2; 30 Stat. 102; Act of June 30, 1932, c. 314, §501, 47 Stat. 415; Government Pamphlet, p. 9).

33 U. S. Code §206. "*Vessel having right of way to keep course.* Art. 21. Where, by any of these rules, one of the two vessels is to keep out of the way, the other shall keep her course and speed." (June 7, 1897, c. 4, §1, 30 Stat. 101; Government Pamphlet, p. 8).

33 U. S. Code §212. "*Special circumstances requiring departure from rules.* Art. 27. In obeying and construing these rules due regard shall be had to all dangers of navi-

gation and collision, and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger." (June 7, 1897, c. 4, §1, 30 Stat. 102; Government Pamphlet, p. 8).

Supervising Inspectors' Rules.

"RULE II. Steam vessels are forbidden to use what has become technically known among pilots as "CROSS SIGNALS", that is, answering one whistle with two, and answering two whistles with one." (Government Pamphlet, p. 18).

"RULE III. The *signals for passing*, by the blowing of the whistle, shall be given and answered by pilots, in compliance with these rules, not only when meeting "head and head", or nearly so, but at all times when the steam vessels are in sight of each other, when passing or meeting at a distance within half a mile of each other, and whether passing to the starboard or port.

"The whistle signals provided in the rules for steam vessels meeting, passing, or overtaking are never to be used except when steam vessels are in sight of each other, and the course and position of each can be determined in the daytime by a sight of the vessel itself, or by night by seeing its signal lights. In fog, mist, falling snow, or heavy rainstorms, when vessels can not so see each other, fog signals only must be given." (Government Pamphlet, p. 18).

"RULE VII. When two steam vessels are approaching each other at right angles or obliquely so as to involve risk of collision, other than when one steam vessel is overtaking another, the steam vessel which has the other on her own port side shall hold her course and speed; and the steam vessel which has the other on her own starboard side shall keep out of the way of the other by direct-

ing her course to starboard so as to cross the stern of the other steam vessel, or, if necessary to do so, slacken her speed or stop or reverse.

"If from any cause the conditions covered by this situation are such as to prevent immediate compliance with each other's signals, the misunderstanding or objection shall be at once made apparent by blowing the danger signal, and both steam vessels shall be stopped and backed if necessary, until signals for passing with safety are made and understood." (Government Pamphlet, p. 19).